Sullivan Industries, Inc. ***and*** **United Steelworkers of America, AFL–CIO.** Cases 1–CA–25698 and 1–CA–25869

January 24, 1997

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 21, 1991, the National Labor Relations Board issued a Decision and Order[1] in this proceeding, finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to adhere to its obligation as a successor to recognize and bargain with the Union on and after August 10, 1988, and by withdrawing recognition from the Union about October 6, 1988. The Respondent was ordered to cease and desist from refusing to bargain with the Union and, on request, to bargain with the Union.

The Respondent filed a petition for review in the United States Court of Appeals, District of Columbia Circuit and the Board cross-applied for enforcement of its order. On March 13, 1992, the court denied the Respondent's petition for review insofar as it sought to overturn the Board's conclusion that the Respondent's failure to recognize the Union as of August 10, 1988, violated Section 8(a)(5) and (1) of the Act. The court granted the Board's petition to enforce its cease-and-desist order.[2] The court, however, denied enforcement of that portion of the Board's decision that (1) found that the Respondent's unlawful refusal to bargain with the Union tainted a subsequent employee petition rejecting union representation, and (2) imposed a bargaining order. The court remanded the case to the Board to explain why the Respondent could not lawfully withdraw recognition on the basis of the petition and also to explain why a bargaining order was an appropriate remedy.

On May 28, 1992, the Board advised the parties that it had accepted the remand and invited statements of position. The Respondent and the Union filed briefs, and the General Counsel filed a statement of position.

The Board has considered its original decision and the record in light of the court's remand and the parties' statements of position and has decided to remand the case to the chief administrative law judge for assignment to an administrative law judge[3] for the purpose of conducting an expedited hearing as set forth below.

[1] 302 NLRB 144.

[2] *Sullivan Industries v. NLRB*, 957 F.2d 890 (D.C. Cir 1992).

[3] The administrative law judge who heard the case is no longer with the Agency.

I. FACTS

The essential facts are not in dispute. For over 40 years, the Union had represented employees at the Claremont, New Hampsire facility of Joy Manufacturing Company (Joy). In 1984, Joy sold the Claremont facility to Sullivan Machine Company (Old Sullivan). Old Sullivan continued in the same business as Joy, and the unit employees continued to be represented by the Union. Old Sullivan filed for bankruptcy and, in March 1988,[4] closed the facility. That same month, Sullivan Industries (the Respondent, New Sullivan) was incorporated for the purpose of acquiring the assets of Old Sullivan and, eventually, taking over the business.

In April, a bankruptcy court appointed a management company (AAMC) to manage the business on a interim basis. Some Old Sullivan employees and supervisors were hired, and limited operations resumed. AAMC continued to recognize the Union and to adhere to the terms of the most recent collective-bargaining agreement.

On June 10, Old Sullivan's personnel manager advised the Union that Old Sullivan was terminating its business as of June 30 and that all assets would be sold and all employees terminated. All Old Sullivan employees were invited to submit employment applications to New Sullivan.

On July 6, the Claremont facility, under New Sullivan's ownership, reopened with approximately 50 unit employees, and with David Pollock as president and chief operating officer. On the same day, union officials met with Pollock and other New Sullivan officials and requested recognition and adherence to the collective-bargaining agreement. Pollock told them that New Sullivan would not honor the contract and that New Sullivan would decide on recognition only after it had hired a substantial and representative complement of employees. Shortly thereafter, Pollock reiterated his position to the unit employees.

On July 22, the Union's attorney demanded recognition, asserting that the Respondent had hired a substantial and representative complement of Old Sullivan employees. The Respondent's attorney replied by letter on August 10 that it expected to reach normal or substantially normal production with a substantial and representative complement of workers during the week of October 3 and would respond at that time.

At a staff meeting in early August, Pollock told the employees that the Respondent anticipated obtaining a substantial and representative complement of employees in late September or early October. He also told the group that he had no problem with recognizing the Union, and that if the employees did not want the Union, they should come forward and tell him. Pollock

[4] All dates are 1988 unless otherwise indicated.

concluded by telling the employees that, in the meantime, he would do what he wanted with or without the Union.

At a staff meeting on September 1, Pollock once again informed employees that the Respondent expected to have a substantial and representative complement of its work force by early October. He stated that the Respondent would decide on recognition at that time.

By letter dated October 4, New Sullivan indicated that it would recognize the Union. The next day, Pollock assembled the unit employees and told them of his decision. A few hours later, an employee, Paul Lacroix, handed Pollock a petition signed by 60 of the 90 unit employees stating that they did not "wish to be represented by the United Steelworkers Union or any union at this time." The petition is dated at the top "8/8/88" in the same black ink as that of the petition's first signature, Stanley J. Kowalczyk. The following appears after the last signature: "Date of Last Signature 10/5/88." This is followed by someone's initials, possibly Lacroix's. The employees had signed in pens using four different inks, with points of varying thicknesses, and in pencil. On October 6, New Sullivan informed the Union that it was withdrawing recognition in light of the petition.

II. THE BOARD AND COURT DECISIONS

The administrative law judge found that the Respondent had employed a substantial and representative complement of employees on or about August 10 and therefore that it unlawfully withheld recognition from that date forward. He also found that this unlawful delay in recognizing the Union tainted the subsequent antiunion petition and that the Respondent could not rely on that petition as evidence that the Union no longer had majority support. Thus, he found that the Respondent also unlawfully withdrew recognition from the Union on October 6. He recommended a cease-and-desist order and that the Respondent be ordered to recognize and bargain with the Union, on request. The Board adopted the judge's findings and recommendations.

As noted above, the court of appeals agreed with the Board that the Respondent had violated Section 8(a)(5) of the Act when it withheld recognition of the Union on August 10, 1988. The court remanded the case, however, for an explanation by the Board of why the employee petition was not an objective consideration on which the Respondent could base a good-faith doubt of the Union's majority status sufficient to justify withdrawal of recognition. The court faulted the Board for its "conclusory statements in this case that any unlawful delay in recognition automatically taints a subsequent employee petition disclaiming the union . . . ." Id. at 898. A "per se rule" of this sort, observed the court, is contrary to the usual case where "the Board consider[s] whether a causal connection exists between unfair labor practices and the union's loss of majority support." Id. at 899. Finding no precedent announcing such a per se rule, the court remanded the case to the Board to explain whether it has a per se rule in these situations and, if so, the reasons for it. The court directed that, if the Board did not have a per se rule, it must show by substantial evidence that the Respondent's refusal to recognize the Union "had a meaningful impact on employee support for the union and thereby tainted the petition." Id. at 902. The court also ordered the Board to explain its reasons for giving a bargaining order. Id. at 903–904.

III. ANALYSIS AND CONCLUSIONS

The concerns of the court described above were essentially addressed by the Board in *Lee Lumber*, 322 NLRB No. 14 (Sept. 6, 1996), which the Board had withdrawn from the same court prior to briefing because it appeared to raise the same issues that concerned the court when it remanded this case, among others.[5] In *Lee Lumber*, the Board explained its view of the effect that a withdrawal of recognition is likely to have on employee sentiment regarding the collective-bargaining representative and the legal consequences that properly flow from an unlawful withdrawal of recognition that is followed by loss of majority support for the representative. We believe that the principles concerning unlawful withdrawal of recognition set out in *Lee Lumber* are equally applicable to the unlawful delay in extending recognition that was found in this case. Accordingly, this case is governed by the following rebuttable presumption set out in *Lee Lumber*:

> [W]e reaffirm the Board's practice of presuming that, when an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any employee disaffection from the union that arises during the course of that failure or refusal results from the earlier unlawful conduct. In the absence of unusual circumstances, we find that this presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Only such a showing of bargaining for a reasonable time will rebut the presumption. [Slip op. at 4, fn. omitted.]

[5] See *Williams Enterprises*, 312 NLRB 937 (1993), enfd. 50 F.3d, 1280 (4th Cir. 1995); *Caterair International, Inc.*, 322 NLRB No. 11 (Aug. 27, 1996).